

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 09 September 2005

Case No.: 2005-BLA-5380

In the Matter of:

**Paris R. Varney,
Claimant**

v.

**Eastern Coal Corp.,
Employer**

And

**Director, Office of Workers' Compensation
Programs,
Party-In-Interest**

**DECISION AND ORDER
DENYING BENEFITS**

This proceeding arises from a claim for benefits filed by Cathy Varney Hatfield [hereinafter "Claimant"], divorced spouse of Paris R. Varney, a coal miner, under the Black Lung Benefits Act, 30 U.S.C. § 901, et seq. Regulations implementing the Act have been published by the Secretary of Labor in Title 20 of the Code of Federal Regulations.¹

Black lung benefits are awarded to coal miners who are totally disabled by pneumoconiosis caused by inhalation of harmful dust in the course of coal mine employment and to the surviving dependents of coal miners whose death was caused by pneumoconiosis. Coal workers' pneumoconiosis is commonly known as black lung disease.

A formal hearing was held before me on June 14, 2005 in Pikeville, Kentucky, at which time all parties were afforded full opportunity in accordance with the Rules of Practice and Procedure (29 C.F.R. Part 18) to present evidence and argument as provided in the Act and the regulations issued thereunder, set forth in Title 20, Code of Federal Regulations, Parts 410, 718, 725, and 727. At the hearing, I admitted into the record Claimant's Exhibit (CX) 1 and

¹ The Secretary of Labor adopted amendments to the "Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969" as set forth in Federal Register/Vol. 65, No. 245 Wednesday, December 20, 2000. The revised Part 718 regulations became effective on January 19, 2001. Since the current claim was filed on March 21, 2002 (DX 3), the new regulations are applicable.

Director's Exhibits (DX) 1-172. The Claimant submitted her brief on August 8, 2005; the Employer submitted its brief on August 25, 2005. The Director did not submit a brief.

I have based my analysis on the entire record, including the hearing transcript (Tr.), exhibits, and representations of the parties, and given consideration to the applicable statutory provisions, regulations, and case law, and made the following findings of fact and conclusions of law.

Procedural History

Mr. Varney filed his original claim for black lung benefits on July 26, 1979, which was denied; he did not further pursue this claim.] (DX 1) Mr. Varney filed a second claim on August 7, 1990, which was denied by an administrative law judge on May 21, 1993 (DX 51). This denial was subsequently affirmed by the Benefits Review Board (DX 63). Mr. Varney filed a request for modification on August 16, 1995 (DX 67), and Administrative Law Judge Wood issued a Decision and Order awarding benefits on May 12, 1998. (DX 108) This decision was affirmed by the Benefits Review Board on July 6, 1999. (DX 112) Judge Wood's decision provided that Mr. Varney had two dependent children for purposes of augmentation of benefits.

Claimant filed for benefits on behalf of herself and her son on September 14, 1998. (DX 121) The U.S. Department of Labor began sending checks to the Claimant on March 26, 1999, and included payment for retroactive benefits. (DX 122) However, Eastern Coal Corporation [hereinafter "Employer"] refused to make payments to Claimant until it received proof of her status as a legitimate dependent. (DX 127) After the Claimant provided documentation, the Employer commenced paying benefits to Mr. Varney, and to the Claimant and their dependent son. (DX 129) However, by letter dated March 29, 2001, the Employer notified Mr. Varney that it had learned that his son was not in school after June 1999, and thus he was ineligible for benefits after that date. Thus, an overpayment had occurred. The Employer also stated that it had talked with Mr. Varney's daughter, who stated that Mr. Varney was providing the Claimant with monthly checks representing her portion of black lung benefits. However, the Employer was also sending the Claimant monthly benefits by a separate check. The Employer noted that questions had been raised about the Claimant's eligibility as a dependent, and that it was ceasing the monthly payments to the Claimant. (DX 134).

The Claims Examiner notified Claimant on April 26, 2001 that she was not a legitimate dependent, and therefore not eligible to collect benefits awarded to Mr. Varney. (DX 136) The Director amended Mr. Varney's award on June 18, 2001 to exclude the Claimant as Mr. Varney's dependent, and also found that the Claimant owed the Employer an overpayment in the amount of \$3,401.60. (DX 138)

The Claimant requested a hearing with the Office of Administrative Law Judges on June 23, 2001. (DX 139) It appears that an informal conference was scheduled in February 2002, but the Employer did not receive notice (DX 153). The Claimant again requested a hearing with the OALJ on January 22, 2003 (DX 151) In a letter dated January 23, 2003, the Claims Examiner informed Claimant that she could not request a hearing because she had no right to appeal. (DX

152) However, the matter was forwarded to the Office of Administrative Law Judges for a formal hearing on May 16, 2003. (DX 154)

A hearing was held before Administrative Law Judge Roketenetz on December 10, 2003 in Prestonsburg, Kentucky. (DX 156) Judge Roketenetz remanded the matter to the Director to investigate whether the Claimant received any type of financial assistance from Mr. Varney. (DX 157) The Director issued a Proposed Decision and Order on October 19, 2004 denying benefits, stating that the Claimant is not an eligible augmentee on the claim of Mr. Varney. (CX 1 at 32) The Claimant requested a hearing with the Office of Administrative Law Judges; the claim was forwarded, and I held a hearing in Pikeville, Kentucky on June 14, 2005.

Issues

The only issue to be decided in this matter is whether Claimant, the divorced spouse of Mr. Varney, is entitled to benefits as Mr. Varney's dependent.

Findings of Fact and Conclusions of Law

Background

The Claimant was married to Mr. Paris Varney, a miner, on July 23, 1973. (CX 1 at 17) They divorced on March 17, 1986, and Mr. Varney was ordered to pay to the Claimant \$300 a month in alimony and child support, "one-half of any accrued black lung benefits to date to which [Mr. Varney] may be entitled," and "all amounts of black lung benefits as spousal maintenance and child support to which they may be entitled." (DX 121)

The Claimant married Earsel Hatfield on June 14, 1987. This marriage ended in divorce on September 6, 1995. (DX 131) Mr. Hatfield was ordered to pay the Claimant \$150.00 per month for spousal maintenance. (DX 131)

The Department of Labor awarded Mr. Varney black lung benefits on May 12, 1998. (DX 108) In Judge Wood's award, she determined Mr. Varney's two children to be his dependents, but there was no mention of the Claimant. (DX 108 at 14) The Claimant filed for benefits on September 14, 1998, stating her status as "divorced wife" of Mr. Varney on the claim form. (DX 117) The U.S. Department of Labor sent the Claimant a check for \$6,808.90 for retroactive benefits for the period of October 1995 through February 1999, and instructed the Claimant that she would receive monthly checks in the amount of \$352.10 for benefits. (DX 122) The Employer refused to pay the benefits and refused to reimburse the Trust Fund until it received evidence that Mr. Varney had a legitimate dependent. (DX 124, 127)

After the Claimant provided some documentation, the Employer initiated payments to the Claimant on February 10, 2000. (DX 129) On March 29, 2001, Employer sent a letter to Mr. Varney informing him that the Claimant was not a valid dependent, and that payments to her would cease. (DX 134) The Claimant objected to this (DX 135), and this claim ensued.

Hearing Testimony

Testimony of Kathy Varney Hatfield

The Claimant testified that she remained married to Mr. Varney until 1985. (Tr. at 26) She then Mr. Hatfield, but this marriage also ended in divorce in 1995. (Tr. at 26) Mr. Hatfield was required to pay the Claimant \$150.00 a month for medical maintenance until she divorced or remarried. (Tr. at 27) At the time of the hearing, the Claimant was still receiving these payments. (Tr. at 27)

In addition to the payments from Mr. Hatfield, the Claimant's monthly income includes her teacher's retirement of \$835.00, social security of \$601.00, and \$300.00 from Mr. Varney. (Tr. at 27-28) While she shared an apartment with Mr. Varney before he was relocated to a nursing home, she has moved, and she currently rents a small home for \$375.00 a month. (Tr. at 28-29)

The Claimant outlined her expenses. Her utilities cost about \$500.00 a month at the most. (Tr. at 28-29) Her cable and telephone bills combined total about \$160.00. (Tr. at 29) Her car insurance is \$120.00 a month. (Tr. at 29) She also pays about \$120.00 a month for Mr. Varney's life insurance. (Tr. at 29) Grocery, cleaning and toiletry expenses total about \$75.00 a week. (Tr. at 30)

The Claimant's medical expenses consist primarily of her prescriptions, which cost about \$10.00 each time she has a prescription filled. (Tr. at 30) She also has to pay for gas to drive to and from her doctor and therapist appointments. (Tr. at 30-31) Each time she visits her therapist, about once a month, her car uses a half tank of gas. (Tr. at 30-31) She also still has some bills to pay from a hospital stay that total \$1145. (Tr. at 31)

The Claimant's credit card debt costs \$151 a month. (Tr. at 31-32) She spends around \$300 to \$350 each summer for clothes. (Tr. at 32) She spends the same amount each season for winter clothes. (Tr. at 32) She sees her grandchildren four times a month, spending \$50 or \$60 every two weeks. (Tr. at 32) They usually go for ice cream or to a movie. (Tr. at 32) This amount is also used to buy her grandchildren presents. (Tr. at 32)

The Claimant and Mr. Varney have a joint checking account, but the Claimant also maintains a separate account. (Tr. at 33) The Claimant has written most of the checks from the joint account because during her relationship with Mr. Varney, she paid the bills and took care of purchasing what they needed. (Tr. at 33) Mr. Varney rarely wrote a check, unless he needed something special. (Tr. at 33-34)

The Claimant also testified by deposition on October 18, 2001. (DX 155) Her deposition testimony mirrors her hearing testimony, but adds some small details. She testified that Mr. Varney allowed her to stay in his trailer for approximately three months after she divorced her second husband. (DX 155 at 31-33, 39) Although Mr. Varney wanted her to stay with him, the trailer they lived in belonged to their daughter, and their daughter forbade her to stay there. (DX 155 at 34) Up to that time, the only support Mr. Varney ever provided for Claimant besides the

three months of lodging consisted of gifts of \$2 to \$3 dollars on occasion and a check for \$100. (DX 155 at 42) The last support the Claimant received from Mr. Varney was about one year before the deposition. (DX 155 at 37) The Claimant believed that Mr. Varney would have provided more support for her had her daughter, who had Mr. Varney's power of attorney, allowed it.

Testimony of Linda Justice

Ms. Justice testified as to her awareness of the Claimant's 1985 divorce from Mr. Varney and the support that he provided. (Tr. 13-14) She agreed that the Claimant and Mr. Varney lived together since 2001 and that Mr. Varney, through his daughter, gave the Claimant \$5,800 in payment of back alimony.² (Tr. at 14)

Ms. Justice also testified as to her knowledge regarding the Claimant's support agreement with her second husband, Mr. Hatfield. (Tr. at 15) The agreement provided that the Claimant could live in a trailer owned by Mr. Hatfield. (Tr. at 15) However, the trailer was uninhabitable due to water problems, and the Claimant moved out immediately. (Tr. at 15-16)

According to Ms. Justice, Mr. Varney's nursing home has sent the Claimant alimony checks for \$300.00. (Tr. at 16) The Claimant stopped receiving these checks, but was later reinstated. (Tr. at 16-18) However, the payments stopped a second time, and the Claimant has not received anything since. (Tr. at 18)

Ms. Justice never lived with the Claimant while she was married to either Mr. Varney or Mr. Hatfield. (Tr. at 19) She currently stays with Ms. Hatfield every weekend. (Tr. at 19)

Testimony of Cecelia Varney

Ms. Varney is the Claimant's daughter-in-law; she is married to the Claimant's son. (Tr. at 24) She has never lived with the Claimant. (Tr. at 24)

Ms. Varney testified that Mr. Varney's daughter gave the Claimant a check for \$5,800. (Tr. at 21) According to Ms. Varney, this money was provided to the Claimant in order to purchase items she and Mr. Varney needed to live in the same apartment and for alimony back pay. (Tr. at 21) The furniture in the Claimant's current apartment was purchased with this money. (Tr. at 22) Ms. Varney believed Mr. Varney provided this amount partly as alimony and partly to pay their bills. (Tr. at 23) Since the Claimant has stopped taking care of Mr. Varney, she has had a more difficult time. (Tr. at 23)

Ms. Varney was aware that the Claimant had to leave Mr. Hatfield's trailer due to the water situation. (Tr. at 21) She also was aware that Mr. Hatfield provided the Claimant with a \$75.00 check every two weeks and that Mr. Varney's nursing home provided a \$300.00 check. (Tr. at 21) Ms. Varney believed this \$300.00 provided an essential part of the Claimant's income. (Tr. at 23)

² Apparently, this is the same daughter who refused to allow the Claimant to live with her father, and would not allow him to provide her with any support.

DISCUSSION

A claimant's award of benefits under Part C of the Act is to be augmented on behalf of the following dependents who meet the conditions of relationship set out in the regulations: (1) spouse; (2) divorced spouse; or (3) child. 20 C.F.R. § 725.210 (2000) and (2001). For the miner's benefits to be supplemented because of any of these relationships, the individual must establish the validity of the purported relationship and the appropriate degree of dependency upon the miner.

The relationship prong of this test requires the Claimant to prove she was married to the miner for ten years before the divorce decree. 20 C.F.R. § 725.206 (2001). The Claimant married Mr. Varney on July 23, 1973, and they divorced on March 17, 1986. (CX 1 at 17) Thus, the Claimant was married to Mr. Varney for more than ten years before their divorce, and she has satisfied this requirement.

A divorced spouse must also establish that he or she is dependent on the miner. An individual who is the miner's divorced spouse shall be determined to have been dependent on the miner if:

- a) The individual is receiving at least one-half of his or her support from the miner (see 20 C.F.R. § 725.233(g)); or,
- b) The individual is receiving substantial contributions from the miner pursuant to a written agreement (see 20 C.F.R. § 725.233(c) and (f)); or
- c) A court order requires the miner to furnish substantial contributions to the individual's support (see § 725.233 (c) and (e)).

20 C.F.R. § 725.207 (2001). *See also, Gala v. Director, OWCP*, 3 B.L.R. 1-809 (1981). Under § 725.233(a), the term "support" is defined as including "food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported." *Putnam v. Director, OWCP*, 12 B.L.R. 1-127 (1988). The regulations define "substantial contribution" as "contributions that are customary and sufficient to constitute a material factor in the cost of the individual's support." 20 C.F.R. § 725.233(c).

The Claimant has failed to meet the requirements of 20 C.F.R. § 725.207(b), as there is no evidence in the record of any written agreement between the Claimant and Mr. Varney that obligated Mr. Varney to provide substantial contributions to her support.³

Likewise, the Claimant cannot satisfy the requirements of 20 C.F.R. § 725.207(c), which requires the existence of a court order requiring Mr. Varney to make substantial contributions to

³ "Written agreement" is defined in the regulations as "an agreement signed by the miner providing for substantial contributions by the miner for the individual's support. It must be in effect at the applicable time but it need not be legally enforceable." 20 C.F.R. § 725.233(f).

her support. The Claimant is not legally entitled to \$300 a month in alimony, nor is Mr. Varney legally obligated to pay it, as the support order terminated upon the Claimant's remarriage. Kentucky law dictates that "unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon . . . the remarriage of the party receiving maintenance." KY. REV. STAT. ANN. § 403.250(2) (Banks-Baldwin 2003). Thus, in the absence of any statement in the decree ordering Mr. Varney to continue alimony payments after the Claimant remarries, the effectiveness of the court order expired upon the Claimant's marriage to Mr. Hatfield, terminating Mr. Varney's obligation to pay such support and ending the Claimant's entitlement to support from Mr. Varney.

Further, the order required Mr. Varney to pay \$300 a month for "spousal support *and* child support." Because the Claimant and Mr. Varney have two children together, even if the right to these payments had not terminated, the Claimant can only include her proportional share of \$100 a month in determining Mr. Varney's contribution to her support, absent evidence indicating he intended the Claimant to receive the full \$300 a month. *See Trevena v. Director, OWCP*, 7 B.L.R. 1-799, 1-802 (1985) (holding that child support should not be used in calculating the support share).

Pursuant to Kentucky law, the Claimant's remarriage to Mr. Hatfield rendered the divorce decree's support order ineffective. *See* KY. REV. STAT. ANN. § 403.250(2). Therefore, there is no court order that requires Mr. Varney to pay the Claimant any contribution toward her support. The Claimant argues that the lack of an alimony termination clause in the divorce decree allows her entitlement to support to continue. But Kentucky law is clear on this matter. Because there is no express statement in the divorce decree between Mr. Varney and the Claimant requiring support to continue, the Claimant's entitlement to benefits ceased when she married Mr. Hatfield.

Finally, I find that the Claimant has not met the requirements of 20 C.F.R. § 725.207(a), in that she has not established that Mr. Varney is contributing at least one half of her support. In this regard, the documents and testimony present a confusing and conflicting picture. The Claimant argues that she and Mr. Varney lived together from December 2001 until February 2004, when he had to be admitted to the Good Shepherd Nursing Center (Claimant's Brief at 3).

However, the record reflects that on December 4, 2002, the administrator of the Mingo Manor Nursing Home, in Williamson, West Virginia, submitted a Request to be Selected as Payee to the Department of Labor, stating that Mr. Varney had lived in the nursing home since June 2002, and that he had been found to lack the capacity to handle money matters. Attached was a statement from Dr. Dorval Donahoe, confirming that Mr. Varney had a mental impairment that made him unable to manage benefit payments, and indicating that this inability was expected to continue indefinitely (DX 148). There is nothing in the exhibit file that indicates when Mr. Varney left the Mingo Manor Nursing Home, although the Good Shepherd Community Nursing Center in Phelps, Kentucky advised the Department of Labor by letter dated June 16, 2004, that Mr. Varney had recently been admitted (DX 165).⁴ Although the Claimant testified in her deposition that Mr. Varney lived with her for a few months in 2001, there is no evidence other

⁴ It appears that Mr. Varney's Medicaid benefits ran out at about this time.

than her testimony to suggest that he lived with her after he first entered the nursing home in June 2002.

Nevertheless, the exhibit file contains a document dated December 12, 2002, submitted by the Claimant, purportedly executed by Mr. Varney, giving the Claimant his power of attorney. (DX 158). The Claimant also submitted a copy of an apartment lease in the names of herself and Mr. Varney, dated December 13, 2002 (DX 161). On December 29, 2002, the Claimant submitted a letter to the Director stating that she and Mr. Varney were living together, and that he was providing her support, and purportedly signed by Mr. Varney (DX 149). Checks and other documents submitted by the Claimant indicate that she continued to live at that address at least until 2004. Additionally, the Federal and West Virginia tax returns completed by the Claimant for 2003 reflect that she lived at this address.

But there is no evidence to establish that Mr. Varney ever actually lived with the Claimant other than for a few months in 2001. Indeed, the Claimant stated on her federal and state tax returns for 2003 that she had two dependent children, a niece and nephew, who lived with her in 2003, and for whom she claimed exemptions (DX 163).⁵

The evidence that is in the record suggests that Mr. Varney has been in a nursing home since the middle of 2002, and that since that time, he has lacked the mental capacity to handle his financial affairs. The copies of checks submitted by the Claimant, purportedly representing payments to her from Mr. Varney, were written on an account in both of their names, and with a few exceptions, signed by her. The monthly checks the Claimant received more recently came from the Good Shepherd Nursing Home, which was under the mistaken impression that the Claimant was entitled to receive them out of Mr. Varney's monthly black lung benefits check. In short, there is insufficient evidence to establish that since 2002, when he entered the nursing home, Mr. Varney has provided the Claimant with any funds at all.

But even assuming that Mr. Varney in fact has been providing the Claimant with \$300 a month, that amount is clearly much less than one half of her monthly support. The Claimant testified that her monthly expenses exceed \$1500 a month. (Tr. at 28-32) According to the Claimant, since her divorce from Mr. Varney, he has provided her three months of lodging, \$2 or \$3 on occasion, and a check for \$100. (DX 155 at 42) More recently, she has received several \$300 checks allegedly from Mr. Varney⁶ and from his retirement home for court-ordered alimony and child support.⁷ (CX 1 at 15, 29, 31, 51-59)

She also testified that she received \$5800 from Mr. Varney to purchase items she and Mr. Varney needed for their home and for alimony back pay. (Tr. at 14) There is no evidence of this

⁵ In the documents she submitted at the hearing, however, the Claimant included the first page of her 2002 federal income tax return, which does not list any dependent children, copied onto a heading for a 2003 federal income tax return.

⁶ The record indicates that the Claimant wrote at least five of these checks and then Mr. Varney signed them. (DX 159)

payment in the record and it is unclear when this payment was made. Furthermore, it is unclear what portion of this amount, if any, was allocated to alimony and the Claimant's support.

Again, accepting the Claimant's account, she lived with Mr. Varney from December 2001 until February 2004, when he apparently entered the nursing home. Claimant's Brief, August 8, 2005, at 3. But there is no indication in the record as to whether Mr. Varney paid for the rent for this apartment or whether the Claimant, who actually wrote and signed the checks, paid that rent.

I find the Claimant has failed to satisfy that she received sufficient support from Mr. Varney to meet the dependency test. Clearly, even accepting the Claimant's testimony at face value, Mr. Varney did not furnish one-half of the Claimant's support, as measured by her expenses, which exceed \$1500 a month. Therefore, the Claimant has not met the requirements of 20 C.F.R. § 725.207(a).

CONCLUSION

The Claimant has not established that she is an eligible dependent of Paris Varney for purposes of augmentation of his Black Lung benefits. Accordingly, her claim must be denied.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the claim of Cathy Varney Hatfield for benefits under the Act as a dependent of Paris Varney is DENIED.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).